

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

SECUNDINO BAEZ,)	
)	
Plaintiff,)	
)	
v.)	
)	
UNITED STATES OF AMERICA;)	No. CV-09-662-HU
JANET NAPOLITANO, Secretary)	
of Homeland Security of the)	
United States; ALEJANDRO)	
MAYORKAS, USCIS Director;)	
CHRISTINA POULOS, Director,)	
USCIS California Service)	OPINION & ORDER
Center; ERIC HOLDER, United)	
States Attorney General,)	
)	
Defendants.)	

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1 - OPINION & ORDER

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15 HUBEL, Magistrate Judge:

16 Plaintiff Secundino Baez brings this immigration action
17 against the United States, Secretary of Homeland Security Janet
18 Napolitano, United States Citizenship and Immigration Services
19 (USCIS) Director Alexander Mayorkas, USCIS California Service
20 Center Director Christina Poulos, and United States Attorney
21 General Eric Holder.

22 Plaintiff's Second Amended Complaint has five claims,
23 discussed more fully below. Defendants move to dismiss the action
24 based on the lack of subject matter jurisdiction. Alternatively,
25 defendants move for summary judgment on all claims. In response to
26 defendants' motion, plaintiff voluntarily dismisses his second
27 claim for relief. Pltf's Mem. in Sup. of Pltf's MSJ at p. 5 n.1
28 (stating that plaintiff dismisses his second claim for relief

1 without prejudice because it is moot). Plaintiff moves for summary
2 judgment on his remaining four claims.

3 All parties have consented to entry of final judgment by a
4 Magistrate Judge in accordance with Federal Rule of Civil Procedure
5 73 and 28 U.S.C. § 636(c). For the reasons explained below, I
6 grant defendants' motion and deny plaintiff's motion.

7 BACKGROUND

8 In 1963, plaintiff, a citizen of Cuba, entered the United
9 States. He was about three years old. He was paroled into the
10 United States under 8 U.S.C. § 1182(d)(5).¹ Plaintiff has remained
11 in the United States, without interruption, for the nearly forty-
12 seven years since his arrival here.

13 In 1986, plaintiff applied to adjust his status to that of a
14 lawful permanent resident pursuant to Section 1 of the Cuban
15 Refugee Adjustment Act of 1996 (CAA). Pub. L. 89-732, 80 Stat.
16 1161 (1966). On February 5, 1991, plaintiff's application for
17 adjustment of status to permanent resident was denied for failure
18 to submit requested documentation.

19 In 2007, plaintiff filed a second application to adjust his
20 status to that of a lawful permanent resident pursuant to the CAA.
21 On February 21, 2008, the USCIS denied plaintiff's application.

22
23
24 ¹ The statute gives the Attorney General the discretion to
25 "parole into the United States temporarily under such conditions
26 as he may prescribe only on a case-by-case basis for urgent
27 humanitarian reasons or significant public benefit any alien
28 applying for admission to the United States[.]" 8 U.S.C. §
1182(d)(5)(A). Parole status, however, "shall not be regarded as
an admission of the alien," id., and thus, is not a "lawful entry
of the alien into the United States." 8 U.S.C. § 1101(a)(13)(A).

1 On May 3, 2008, the Department of Homeland Security issued
2 plaintiff a Notice to Appear, charging him with being removable
3 pursuant to 8 U.S.C. § 1182(a)(7)(A)(i). Plaintiff has had
4 hearings before the immigration court on the following dates, all
5 in connection with this charge of removability: November 4, 2008,
6 March 17, 2009, April 9, 2009, June 12, 2009, and October 22, 2009.

7 At the time of the March 3, 2010 oral argument on the motions
8 at issue here, counsel represented that plaintiff had had an
9 additional hearing on February 23, 2010, at which a July 2012 date
10 was set for a merits hearing.

11 In the context of the removability hearings pending before the
12 Immigration Judge (IJ), in March 2009 plaintiff (1) filed an
13 application for Asylum and Withholding of Removal, (2) renewed his
14 application to adjust his status to permanent resident pursuant to
15 the CAA, and (3) filed an application for Cancellation of Removal.

16 On August 31, 2009, the USCIS vacated, reopened, and
17 reconsidered its prior decision from February 2008 regarding
18 plaintiff's second adjustment of status application.
19 Simultaneously, however, the USCIS notified plaintiff of its intent
20 to deny the adjustment application because plaintiff had not
21 clearly established eligibility for adjustment. Admin. Record (AR)
22 at pp. 10-12. Plaintiff was given thirty days to respond to this
23 Notice of Intent to Deny (NOID). Id. On September 29, 2009,
24 plaintiff responded to the NOID with a six-page letter memorandum
25 and other documents. AR at pp. 13-18. On October 14, 2009, the
26 USCIS denied plaintiff's application. AR at pp. 4-7.

27 The instant action was initially filed on June 15, 2009,
28 before the USCIS vacated, reopened, reconsidered, and re-denied

1 plaintiff's second adjustment application. The Second Amended
2 Complaint was filed on November 25, 2009, after the USCIS's October
3 14, 2009 denial of that application.

4 Additional facts are discussed below.

5 STANDARDS

6 I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

7 A motion to dismiss brought pursuant to Federal Rule of Civil
8 Procedure 12(b)(1) addresses the court's subject matter
9 jurisdiction. The party asserting jurisdiction bears the burden of
10 proving that the court has subject matter jurisdiction over his
11 claims. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
12 377 (1994).

13 A Rule 12(b)(1) motion may attack the substance of the
14 complaint's jurisdictional allegations even though the allegations
15 are formally sufficient. See Corrie v. Caterpillar, Inc., 503 F.3d
16 974, 979-80 (9th Cir. 2007) (court treats motion attacking
17 substance of complaint's jurisdictional allegations as a Rule
18 12(b)(1) motion); Dreier v. United States, 106 F.3d 844, 847 (9th
19 Cir. 1996) ("[U]nlike a Rule 12(b)(6) motion, a Rule 12(b)(1)
20 motion can attack the substance of a complaint's jurisdictional
21 allegations despite their formal sufficiency[.]") (internal
22 quotation omitted). Additionally, the court may consider evidence
23 outside the pleadings to resolve factual disputes. Robinson v.
24 United States, 586 F.3d 683, 685 (9th Cir. 2009); see also Dreier,
25 106 F.3d at 847 (a challenge to the court's subject matter
26 jurisdiction under Rule 12(b)(1) may rely on affidavits or any
27 other evidence properly before the court).

28 / / /

1 II. Summary Judgment

2 Summary judgment is appropriate if there is no genuine issue
3 of material fact and the moving party is entitled to judgment as a
4 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
5 initial responsibility of informing the court of the basis of its
6 motion, and identifying those portions of "'pleadings, depositions,
7 answers to interrogatories, and admissions on file, together with
8 the affidavits, if any,' which it believes demonstrate the absence
9 of a genuine issue of material fact." Celotex Corp. v. Catrett,
10 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

11 "If the moving party meets its initial burden of showing 'the
12 absence of a material and triable issue of fact,' 'the burden then
13 moves to the opposing party, who must present significant probative
14 evidence tending to support its claim or defense.'" Intel Corp. v.
15 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
16 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
17 Cir. 1987)). The nonmoving party must go beyond the pleadings and
18 designate facts showing an issue for trial. Celotex, 477 U.S. at
19 322-23.

20 The substantive law governing a claim determines whether a
21 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
22 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
23 to the existence of a genuine issue of fact must be resolved
24 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
25 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
26 drawn from the facts in the light most favorable to the nonmoving
27 party. T.W. Elec. Serv., 809 F.2d at 630-31.

28 If the factual context makes the nonmoving party's claim as to

1 the existence of a material issue of fact implausible, that party
2 must come forward with more persuasive evidence to support his
3 claim than would otherwise be necessary. Id.; In re Agricultural
4 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
5 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
6 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

7 DISCUSSION

8 I. Plaintiff's Claims

9 Plaintiff has four remaining claims. In his first claim for
10 relief, he challenges the denial of his second application for
11 adjustment to permanent resident status. He alleges that the
12 denial violates the CAA, the Immigration and Nationality Act (INA),
13 the applicable regulations and policy, and the Administrative
14 Procedures Act. He seeks an adjudication of his permanent resident
15 application based on the appropriate legal standard.

16 In his third claim for relief, plaintiff contends that
17 defendants' denial of his second application for adjustment to
18 permanent resident status violates the CAA, the INA, the applicable
19 regulations and policy, and the Administrative Procedures Act
20 because it is not based on substantial evidence. He seeks an
21 adjudication of his permanent resident application based on the
22 record.

23 In his fourth claim for relief, plaintiff contends that a 2009
24 ruling by the Bureau of Immigration Appeals (BIA) in Matter of
25 Martinez-Montalvo, 24 I&N Dec. 778 (BIA 2009), which plaintiff
26 asserts prohibits him from seeking an adjustment to permanent
27 resident status in the context of his removal proceedings, violates
28 the CAA, the INA, the applicable regulations and policy, and the

1 Administrative Procedures Act. He seeks to present a full defense
2 to removal, including raising an adjustment claim under the CAA,
3 before the IJ.

4 In his fifth claim for relief, plaintiff contends that
5 defendants' reliance on Martinez-Montalvo violates the CAA, the
6 INA, the applicable regulations and policy, the United States
7 Constitution, and the Administrative Procedures Act because it is
8 impermissibly retroactive. Plaintiff seeks to have his application
9 for adjustment under the CAA adjudged in accordance with the rules
10 in effect on the date of his filing.

11 Because subject matter jurisdiction is a threshold issue, I
12 address defendants' motion first.

13 II. Subject Matter Jurisdiction Over Plaintiff's Fourth
14 & Fifth Claims for Relief

15 Martinez-Montalvo, decided in April 2009, overturned the 2001
16 BIA decision In re Artigas, 23 I&N Dec. 99 (BIA 2001). Both
17 decisions concern the ability of certain aliens to seek an
18 adjustment of status to permanent resident in the context of
19 removal proceedings. Although not directly relevant to the subject
20 matter jurisdiction determination, a review of some statutory
21 history provides context for the discussion.

22 Before 1996, the then-Immigration and Naturalization Service
23 (INS) conducted (1) deportation hearings to deport aliens who had
24 actually entered the United States, and (2) exclusion hearings to
25 bar entry into the United States for those aliens seeking to enter
26 the country. See Eligibility of Arriving Aliens in Removal
27 Proceedings to Apply for Adjustment of Status and Jurisdiction to
28 Adjudicated Applications for Adjustment of Status, 71 Fed. Reg.

1 27585-01, 2006 WL 1288099 (May 12, 2006) (explaining history of
2 regulations).

3 Before 1996, adjustment of status applications, including
4 those brought under the CAA, were exclusively presented to an IJ if
5 deportation proceedings against the alien had been initiated.
6 However, aliens in exclusion hearings could not pursue an
7 adjustment of status application with the IJ. Rather, such aliens
8 were required to file adjustment of status applications with the
9 District Director of the INS (now, the USCIS).

10 After the 1996 passage of the Illegal Immigration Reform and
11 Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208,
12 110 Stat. 3009 (1996), all proceedings, whether "deportation" or
13 "exclusion," were considered "removal" proceedings. Id. The
14 distinction between "admitted" and "seeking admission" aliens was
15 still relevant, however. Presently, post-IIRIRA, if an alien is
16 seeking admission, the alien is charged in removal proceedings as
17 an inadmissible alien under 8 U.S.C. § 1182. If the alien has been
18 admitted, the alien is charged in removal proceedings as a
19 deportable alien under 8 U.S.C. § 1227. Those aliens seeking
20 admission are referred to as "arriving aliens." See Martinez-
21 Montalvo, 24 I&N Dec. at p. 780 (noting the continued distinction
22 after passage of IIRIRA, "between aliens who have been admitted and
23 those seeking admission, i.e. arriving aliens.").

24 In implementing the IIRIRA, the Attorney General adopted rules
25 that continued the tradition of denying arriving aliens the
26 opportunity to seek adjustment of status before an IJ as a form of
27 relief from removal. Eligibility of Arriving Aliens, 71 Fed. Reg.
28 at 27587. The agency adopted 8 C.F.R. § 245.1(c)(8), and then

1 later 8 C.F.R. § 1245.1(c)(8)², both of which provided that an
2 arriving alien placed in removal proceedings was ineligible for an
3 adjustment of status. Id. This was no different than the pre-
4 IIRIRA law which had also denied arriving aliens the ability to
5 seek an adjustment of status in the context of an exclusion
6 hearing. But, in addition to adopting these regulations, another
7 new regulation prohibited arriving aliens in removal proceedings
8 from filing an adjustment of status application with the USCIS as
9 well. 8 C.F.R. § 245.2(a). This was a change from the pre-IIRIRA
10 law which had allowed arriving aliens in exclusion proceedings to
11 seek an adjustment of status with the then-INS.

12 Challenges to the new regulations were mounted and arguments
13 were made that the regulations were inconsistent with 8 U.S.C. §
14 1255(a) which allows for an application for discretionary
15 adjustment of status by any alien who was "inspected and admitted
16 or paroled."

17 In Artigas, the specific challenge was brought under the CAA.
18 The alien was seeking an adjustment of status under the CAA in the
19 context of his removal proceeding. The government, relying on 8
20 C.F.R. § 245.1(c)(8), argued that arriving aliens placed in removal
21 proceedings could not pursue an adjustment of status under the CAA.
22 The BIA rejected that position, holding that the IJ had
23 jurisdiction to adjudicate adjustment applications under the CAA in
24

25 ² As explained in Bona v. Gonzales, 425 F.3d 663, 665 n.1
26 (9th Cir. 2005), these two regulations are identical. 8 U.S.C. §
27 245.1(c)(8) applied to the immigration agencies within the
28 Department of Homeland Security, while 8 U.S.C. § 1245.1(c)(8)
applied to the immigration courts and the BIA which remain within
the Department of Justice.

1 removal proceedings when a Cuban alien had been charged as an
2 arriving alien without a valid visa or entry document. Artigas, 23
3 I&N Dec. at 103-05. Artigas noted that if the new regulations were
4 given effect, a Cuban alien in a removal proceeding would have no
5 avenue in which to pursue an adjustment of status because one
6 regulation deprived the alien of the opportunity to pursue the
7 adjustment in the removal proceeding and the other regulation
8 deprived the alien of the opportunity to pursue the adjustment with
9 the USCIS. Id. at 105.

10 Rather than invalidate the regulations, the Artigas decision
11 focused specifically on the CAA and held that because 8 C.F.R. §
12 245.1(c)(8) provided that an arriving alien in removal proceedings
13 was ineligible to adjust status to that of a lawful permanent
14 resident "under section 245 of the Act," such ineligibility did not
15 apply to Cuban aliens proceeding under the CAA. Id. at 104. Thus,
16 Artigas carved out an exception to 8 C.F.R. § 245.1(c)(8) for
17 adjustment applications made by arriving aliens under the CAA.

18 Several courts did confront the validity of 8 C.F.R. §
19 245.1(c)(8) head on, including the Ninth Circuit which found it
20 invalid and inconsistent with 8 U.S.C. § 1255(a). Bona, 425 F.3d
21 at 668-71. The Bona court held that the regulation, which
22 precluded the plaintiff, a parolee deemed an arriving alien, from
23 applying for adjustment of status before the IJ, directly
24 conflicted with section 1255(a) which allows any alien who has been
25 "inspected and admitted or paroled" into the country to apply for
26 adjustment of status. Id.

27 Not every court addressing the issue reached the same
28 conclusion, however, with some courts finding the regulation valid.

1 Eligibility of Arriving Aliens, 71 Fed. Reg. at 27587. As a
2 result, the Department of Homeland Security and the Department of
3 Justice adopted new regulations in 2006 to avoid inconsistent
4 interpretation of the rules across the country. Id.

5 Under the new regulations, the "USCIS has jurisdiction to
6 adjudicate an application for adjustment of status filed by any
7 alien, unless the immigration judge has jurisdiction to adjudicate
8 the application under 8 CFR 1245.2(a)(1)." 8 C.F.R. § 245.2(a)
9 (emphasis added). 8 C.F.R. § 1245.2(a)(1) gives IJs who are
10 conducting removal proceedings exclusive jurisdiction to adjudicate
11 adjustment applications by aliens in those proceedings, other than
12 arriving aliens.³ Thus, presently, under the 2006 regulations, an
13 arriving alien in removal proceedings cannot pursue an adjustment
14 of status before the IJ, but, that alien can still file an
15 adjustment of status application with USCIS.

16 In Martinez-Montalvo, the BIA held that the new regulations
17 effectively superseded Artigas by "conferring on the USCIS
18 jurisdiction over an application for adjustment of status filed by
19 'any' alien, and by eliminating the jurisdiction of Immigration
20 Judges over 'any' adjustment application filed by an arriving
21 alien[.]" Martinez-Montalvo, 24 I&N Dec. at 783. The BIA
22 explained that "[n]ow that the amended regulations assure that
23 arriving aliens who are eligible for relief under the [CAA] can
24 file an adjustment application with the USCIS, we see no reason not
25 to afford the term 'any' its full and natural meaning." Id.

26
27 ³ The regulation contains a narrow exception, not
28 applicable here, allowing certain arriving aliens to file an
adjustment application with the IJ in the removal proceeding.

1 The BIA further explained that

2 [i]n other words, there is no longer a need to ascribe a
3 different meaning to the regulatory language to avoid
4 depriving all arriving aliens seeking relief under the
5 [CAA] in removal proceedings of a statutory avenue to
6 adjust their immigration status. Although adjustment
7 under the statute is considered "separate and apart from
8 adjustment of status under section 245 of the Act,"
9 Matter of Artigas, supra, at 106, the intent of Congress
10 in enacting the [CAA] is still honored, because arriving
11 aliens may now seek this form of relief before the USCIS,
12 whether or not they are in removal proceedings, and
13 whether or not they are under an order of removal.

14 Id. Based on this conclusion, the BIA held that the IJ did not
15 have jurisdiction to consider Martinez-Montalvo's CAA adjustment
16 application in the removal proceeding. Id. But, Martinez-Montalvo
17 could elect to file an adjustment application with the USCIS. Id.

18 In the instant case, plaintiff's removal proceedings were
19 initiated in May 2008 and were in progress when the BIA decided
20 Martinez-Montalvo. The record shows that plaintiff's counsel wrote
21 to the IJ handling plaintiff's case on June 1, 2009, and stated
22 that Martinez-Montalvo represented a "substantial change in the law
23 that materially impacts the case[.]" AR at p. 113. Plaintiff's
24 counsel noted that plaintiff's next hearing before the IJ was
25 scheduled for June 12, 2009. Id. Concurrently with the letter,
26 plaintiff filed a motion to continue the removal hearing. Id.

27 In his motion to continue, plaintiff argued to the IJ that
28 Martinez-Montalvo was wrongly decided, could not be applied
retroactively to him, and could cause a removal order to be entered
prior to the completion of judicial review of his adjustment status
application. AR at pp. 97-99. He also argued that the current
June 12, 2009 hearing date did not allow for adequate briefing of
the many complex and novel questions of law raised by Martinez-

1 Montalvo. Id.

2 The IJ denied the motion to continue in a checklist form
3 order. AR at p. 96. However, in a handwritten note at the bottom
4 of the form, the IJ indicated that the motion to continue could be
5 raised at the hearing. Id. As indicated above, plaintiff's
6 hearing has clearly been continued since June 2009, and a merits
7 hearing date sometime in July 2012 has now been set. Thus, the
8 removal proceeding, and any issues attendant to that proceeding, is
9 still pending before the IJ.

10 Defendants argue that this Court lacks subject matter
11 jurisdiction over plaintiff's fourth and fifth claims because these
12 claims relate to questions of law currently pending before the IJ.
13 Because, defendants contend, the issues raised in plaintiff's
14 fourth and fifth claims for relief have not been subject to
15 administrative exhaustion, the issues are not addressed in a final
16 order, a prerequisite to judicial review. Moreover, defendants
17 add, any judicial review of a decision rendered in a removal
18 proceeding is directly to a circuit court, not a district court.
19 I agree with defendants.

20 The issues raised by plaintiff's fourth and fifth claims are
21 pending before the IJ. In his memorandum filed in response to
22 defendants' motion to dismiss/summary judgment motion, plaintiff
23 states that during the June 12, 2009 hearing before the IJ, the IJ
24 considered plaintiff's motion for continuance, and as part of that
25 proceeding, "[e]veryone at the hearing," (whom plaintiff identifies
26 as plaintiff, the IJ, and the lawyer representing the Department of
27 Homeland Security) recognized the precedential effect of Martinez-
28 Montalvo. Pltf's Resp. to Defts' Mtn at p. 4, n.4. Plaintiff

1 argues that Martinez-Montalvo inflicts a concrete injury on him now
2 because, as a result of that decision, he is denied the opportunity
3 to seek adjustment of status as part of his removal proceeding.
4 Thus, he argues, the legal issues he raises in his fourth and fifth
5 claims have been finally decided by the BIA and he is entitled to
6 immediate judicial review of those issues.

7 There are at least two problems with plaintiff's argument.
8 First, the record of the proceedings before the IJ are not part of
9 the Administrative Record in the instant case and thus, there is no
10 admissible evidence in this case to show that the IJ has made any
11 decision whatsoever about the effect of Martinez-Montalvo on
12 plaintiff's adjustment application. Second, there is simply no
13 record of any determination actually made in plaintiff's case
14 precluding plaintiff from seeking to adjust his status before the
15 IJ. Thus, there simply is nothing in plaintiff's case, as of yet,
16 to review.

17 Even if there were a written order from the IJ resolving all
18 of the issues involved in plaintiff's removal proceeding, including
19 his asylum application, his adjustment application, and his request
20 to cancel the removal order, plaintiff may not seek judicial review
21 of the IJ decision without first exhausting his administrative
22 remedies. A court may review a final order of removal only if "the
23 alien has exhausted all administrative remedies available to the
24 alien as of right[.]" 8 U.S.C. § 1252(d)(1); see also Puga v.
25 Chertoff, 488 F.3d 812, 814-15 (9th Cir. 2007) (describing 8 U.S.C.
26 § 1252(d)(1) as a "statutorily-mandated administrative exhaustion
27 requirement"). Plaintiff has the right to appeal the IJ's removal
28 order decision to the BIA. 8 C.F.R. §§ 1003.1(b)(3), 1240.15.

1 Thus, the regulatory scheme requires him to appeal to the BIA
2 before a determination is considered a final order.

3 If and when plaintiff obtains a decision from the BIA,
4 plaintiff will then have exhausted his administrative remedies and
5 will have a final order subject to judicial review. Such review is
6 directly to the circuit court, not the district court. Under 8
7 U.S.C. § 1252(b)(9),

8 [j]udicial review of all questions of law and fact,
9 including interpretation and application of
10 constitutional and statutory provisions, arising from any
11 action taken or proceeding brought to remove an alien
from the United States under this subchapter shall be
available only in judicial review of a final order under
this section.

12 8 U.S.C. § 1252(b)(9). The final order, and any questions of law
13 and fact contained therein, is reviewed only through a "petition
14 for review" filed with the appropriate circuit court of appeals
15 which is the "sole and exclusive means for judicial review of an
16 order of removal[.]" 8 U.S.C. § 1252(a)(5); see also Alvarez-
17 Barajas v. Gonzales, 418 F.3d 1050, 1052 (9th Cir. 2005) (noting
18 that the "REAL ID Act of 2005" expanded the jurisdiction of the
19 circuit courts over final orders of removal and made the circuit
20 courts the "sole" judicial body able to review challenges to such
21 final orders).

22 Plaintiff relies on the "futility exception" to the exhaustion
23 requirement to argue that he may presently obtain judicial review.
24 The Ninth Circuit addressed the futility exception in Sun v.
25 Ashcroft, 370 F.3d 932 (9th Cir. 2004). There, the plaintiff
26 argued that certain claims should be excused from exhaustion
27 because a prior en banc BIA decision foreclosed the arguments he
28 made for the first time in his habeas petition. Id. at 941. The

1 court recognized the general principle that "[w]here a statute
2 specifically requires exhaustion, the requirement is not excused
3 based merely on a judicial conclusion of futility." Id. (internal
4 quotations and brackets omitted).

5 But, the court also noted that 8 U.S.C. 1252(d)(1) requires
6 the exhaustion of administrative remedies which are available to
7 the alien "as of right." Id. The court then explained that
8 "[s]ome issues may be so entirely foreclosed by prior BIA case law
9 that no remedies are available as of right with regard to them
10 before IJs and the BIA." Id. at 942 (internal quotation and
11 ellipsis omitted). The court stated that the "realm of such
12 issues, however, cannot be broader than that encompassed by the
13 futility exception to prudential [e.g., non-statutory] exhaustion
14 requirements." Id.

15 Following that principle, the court looked at the non-
16 constitutional claims the plaintiff raised in his habeas petition
17 and the BIA en banc case the plaintiff contended foreclosed raising
18 those arguments. The court concluded that the BIA case did not
19 establish the law so firmly as to make plaintiff's administrative
20 remedy to the BIA unavailable as of right. Id. at 943-44. Thus,
21 under Sun, while futility is generally not an exception to the
22 exhaustion requirement, futility may be recognized if the BIA case
23 law is firm and settled on a particular issue.

24 Here, Martinez-Montalvo is a single, recent BIA decision that
25 overruled an earlier case. Although there was an intervening
26 change in regulation, a single case is hardly a body of law which
27 firmly establishes the BIA's position. More importantly, however,
28 nothing in the Martinez-Montalvo decision indicates that the BIA

1 considered the arguments that plaintiff makes here as to why that
2 decision was wrongly decided (including noting the different
3 regulatory purposes of the CAA and the INA, and the issuance of the
4 regulation under a grant of power to implement the INA, not the
5 CAA). Thus, the law is not as fully developed and set as plaintiff
6 suggests. Additionally, while the BIA applied its conclusion to
7 the alien in the Martinez-Montalvo case, there was no indication
8 that the alien had raised the retroactive application argument that
9 plaintiff raises here in his fifth claim for relief. Under Sun,
10 even if there were a decision in this case by an IJ which was
11 capable of review, the requirements for an exception to exhaustion
12 based on futility are not established.

13 I grant defendants' motion to dismiss plaintiff's fourth and
14 fifth claims for relief because this Court lacks subject matter
15 jurisdiction over those claims.

16 III. Subject Matter Jurisdiction Over Plaintiff's First
17 & Third Claims for Relief

18 These two claims challenge the October 14, 2009 denial by the
19 USCIS of plaintiff's second adjustment application. In the first
20 claim, plaintiff contends that the adjudication of his adjustment
21 application was based on an inappropriate legal standard. In the
22 third claim, he contends that the denial was not based on
23 substantial evidence in the record.

24 At this point, it is sufficient to note that the USCIS
25 provided two bases for denying plaintiff's application. First, the
26 USCIS found "sufficient, reasonable, substantial, and probative
27 evidence to support a finding" that plaintiff is or was, an
28 "illicit trafficker in a controlled substance," or has been a

1 "knowing assister, abettor, conspirator, or colluder with others in
 2 the illicit trafficking in a controlled substance" and thus the
 3 USCIS denied plaintiff's application pursuant to 8 U.S.C. §
 4 1182(a)(2)(C)(i). AR at p. 5. Second, and alternatively, the
 5 USCIS relied on 8 U.S.C. § 1255(a) and concluded that adverse
 6 factors outweighed positive factors and thus, "as a separate,
 7 distinct and independent ground," the application was "denied as a
 8 matter of discretion." Id. at p. 7.

9 Defendants contend that because the adjustment application was
 10 denied as a matter of discretion, this Court lacks subject matter
 11 jurisdiction to review it. The relevant portion of 8 U.S.C. § 1252
 12 states, in pertinent part, that

13 (B) Notwithstanding any other provision of law (statutory
 14 or nonstatutory), . . . and regardless of whether the
 15 judgment, decision, or action is made in removal
 16 proceedings, no court shall have jurisdiction to review -

17 * * *

18 (ii) any other decision or action of the Attorney
 19 General . . . the authority for which is specified
 20 under this subchapter to be in the discretion of
 21 the Attorney General. . . other than the granting
 22 of relief under section 1158(a) of this title.

23 8 U.S.C. § 1252(a)(2)(B)(ii).

24 Ninth Circuit cases interpreting section 1252(a)(2)(B)(ii)
 25 make clear that a discretionary denial of adjustment under section
 26 1255(a) is unreviewable under section 1252(a)(2)(B)(ii), even when
 27 the discretionary denial is an alternative basis for denying
 28 adjustment. Hassan v. Chertoff, 593 F.3d 785, 788-89 (9th Cir.
 2010) ("judicial review of a discretionary determination is . . .
 expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(ii)"); Hosseini v.
Gonzales, 471 F.3d 953, 956 (9th Cir. 2006) (the court "lack[s]

1 jurisdiction to review the BIA's denial of [the plaintiff's]
 2 adjustment of status claim because the BIA alternatively denied
 3 relief as a matter of discretion.").⁴

4 Plaintiff argues that section 1252(a)(2)(B)(ii) does not apply
 5 here because it is limited to discretionary decisions allowed by
 6 the INA, not to discretionary decisions made under the CAA. The
 7 language in section 1252(a)(2)(B)(ii) withdrawing judicial
 8 jurisdiction and review of discretionary determinations has a
 9 limitation as seen in the underlined language below:

10 Notwithstanding any other provision of law . . . no court
 11 shall have jurisdiction to review . . . any other
 12 decision or action of the Attorney General or the
 13 Secretary of Homeland Security the authority for which is
specified under this subchapter to be in the discretion
 of the Attorney General or the Secretary of Homeland
 Security

14 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

15 Plaintiff argues that the discretion given to the Attorney
 16 General to deny or grant an adjustment application made pursuant to
 17 the CAA is not given pursuant to "this subchapter" because,
 18 according to plaintiff, "this subchapter" refers only to the INA,
 19 not the CAA. While no reported decision from any court appears to
 20 have squarely addressed the issue, the Supreme Court recently
 21 noted, in resolving a different issue, that the reference in
 22 section 1252(a)(2)(B)(ii) to "this subchapter" is to "Title 8,
 23 Chapter 12, Subchapter II, of the United States Code, codified at
 24 8 U.S.C. §§ 1151-1391 and titled 'Immigration.'"). Kucana v.

26 ⁴ Although there is an exception for colorable
 27 constitutional violations, Hassan, 593 F.3d at 789, plaintiff
 28 raises no constitutional issues in his first and third claims for
 relief.

1 Holder, 130 S. Ct. 827, 832 n.3 (2010) (holding that section
2 1252(a)(2)(B)(ii) barred jurisdiction of decisions specified by
3 statute as discretionary but did not bar decisions specified by
4 regulation as discretionary); see also Medina-Morales v. Ashcroft,
5 371 F.3d 520, 528 (9th Cir. 2004) (noting that section
6 1252(a)(2)(B)(ii) refers to acts "the authority for which is
7 specified under the INA to be discretionary") (brackets omitted).

8 The issue is complicated by the fact that the CAA is not
9 codified in the United States Code, but appears only after section
10 1255(a). See Santana Gonzalez v. Attorney General of the U.S., 506
11 F.3d 274, 280-81 (3d Cir. 2007) (citing to CAA as follows: "Cuban
12 Adjustment Act, Pub. L. No. 89-732, [80] Stat. 1161 (1966)
13 (reproduced as historical note to 8 U.S.C. § 1255"); Federation for
14 Am. Immigration Reform v. Reno, 93 F.3d 897, 899 (D.C. Cir. 1996)
15 (same).⁵

16 If reproduction of the CAA following section 1255 is enough to
17 make the CAA part of the INA, then section 1252(a)(2)(B)(ii)
18 applies and bars review of the USCIS's discretionary denial of
19 plaintiff's adjustment status application by any court. If the CAA
20 is not considered part of the INA, then the statutory
21 jurisdictional bar is inapplicable and this Court may review the
22 determination.

23
24 ⁵ In the United States Code itself, the CAA appears
25 following section 1255(a) with no designation whatsoever,
26 including no designation as a historical note. In the United
27 States Code Annotated, published by West Publishing Company, it
28 appears after section 1255(a) and is designated a historical
note. In the United States Code Service, published by Matthew
Bender & Co, it appears after section 1255(a) and is designated
under a section entitled "[o]ther provisions."

1 In pertinent part, section 1 of the CAA states that
2 notwithstanding the provisions of section 245(c) of the
3 [INA], the status of any alien who is a native or citizen
4 of Cuba and who has been inspected and admitted or
5 paroled into the United States subsequent to January 1,
6 1959 and has been physically present in the United States
7 for at least one year, may be adjusted by the Attorney
8 General, in his discretion and under such regulations as
9 he may prescribe, to that of an alien lawfully admitted
10 for permanent residence if the alien makes an application
11 for such adjustment, and the alien is eligible to receive
12 an immigrant visa and is admissible to the United States
13 for permanent residence.

14 CAA, Pub. L. 89-732, 80 Stat. 1161 (1966) (reproduced following 8
15 U.S.C. § 1255(a)). Section 4 of the CAA further provides that

16 the definitions contained in section 101(a) and (b) of
17 the [INA] shall apply in the administration of this Act.
18 Nothing contained in this Act shall be held to repeal,
19 amend, alter, modify, affect, or restrict the powers,
20 duties, functions, or authority of the Attorney General
21 in the administration and enforcement of the [INA] or any
22 other law relating to immigration, nationality, or
23 naturalization.

24 Id.

25 As can be seen from section 1, and as the Ninth Circuit has
26 noted, the language in the CAA is similar to that of section
27 1255(a). Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1118 (9th
28 Cir. 2007) ("Cuban Adjustment Act . . . uses language similar to §
1255(a)."); see also Ibarra v. Swacina, No. 09-22354, 2009 WL
4506544, at *1 (S.D. Fla. 2009) ("The language of the [CAA] mirrors
that of § 1255(a)[.]"). And, as can be seen from section 4, the
CAA expressly provides that it is not intended to interfere with
the administration of the INA, or any other immigration-related
law. Thus, one could argue that given the similarity in language
between the CAA and section 1255(a), the fact that the CAA may not
restrict the enforcement of the INA or other immigration laws, and
that the CAA is appended to section 1255(a), the CAA should be

1 considered part of the INA for purposes of the application of
2 section 1252(a)(2)(B)(ii).

3 During oral argument, defendants' counsel posited that the
4 material found in historical notes to statutes reproduced in the
5 United States Code Annotated (USCA), was placed there by order of
6 a special congressional committee. Although defendants' counsel
7 was unable to provide any authority to support this assertion at
8 the time, I have found that in 1974, Congress established the
9 Office of Law Revision Counsel as part of the House of
10 Representatives. 2 U.S.C. § 285. The principal purpose of the
11 Office of Law Revision Counsel is "to develop and keep current an
12 official and positive codification of the laws of the United
13 States", 2 U.S.C. § 285a, and it is responsible for preparing and
14 publishing the United States Code. 2 U.S.C. §§ 285a-285g.

15 A 1986 law journal article addressing the codification process
16 for federal laws, explains that public laws are published in the
17 United States Statutes at Large and that Congress has directed the
18 Archivist of the United States to compile, edit, index, and publish
19 in the Statutes at Large, all the laws, concurrent resolutions,
20 proclamations by the President, and constitutional amendments
21 issued during each session of Congress. Questions & Answers, 78
22 Law Libr. J. 585, 591 (1986). The United States Code, a subject
23 matter arrangement of statutes, is a consolidation and codification
24 of all the general and permanent laws of the United States in force
25 at the time of publication. Id. As noted above, the Office of Law
26 Revision Counsel prepares and publishes the United States Code.
27 Id.

28 The journal article notes that the Office of Law Revision
23 - OPINION & ORDER

1 Counsel prepares and submits new editions of the United States Code
2 to the Committee on the Judiciary, which publishes new editions and
3 supplements to the United States Code. Id. The article further
4 notes that there are numerous statutes and sections of statutes
5 that never are codified. Id. As explained in the article, the
6 Office of Law Revision Counsel supplies the Archivist of the United
7 States with the codification information that appears in the
8 margins of the official slip laws and Statutes at Large. Id. at
9 592. The Office of Law Revision Counsel selects for inclusion in
10 the Code all provisions of a statute that it considers general and
11 permanent in nature. Id. Exclusion of a statute or a section from
12 the United States Code does not affect its validity. Id. The
13 article explains that in compiling the United States Code, the
14 Office of Law Revision Counsel also includes material, either in
15 notes or appendixes, to aid in the construction and interpretation
16 of the United States Code. Id.

17 In a recent Ninth Circuit case, the court, citing to Questions
18 & Answers, noted that "codification decisions are ordinarily not
19 made by Congress[.]" Ledezma-Galicia v. Holder, 599 F.3d 1055,
20 1063 n.9 (9th Cir. 2010). Plaintiff, citing to this decision and
21 to Questions & Answers, contends, in a post-hearing filing, that
22 the appearance of a note is an editorial decision of the Office of
23 the Law Revision Counsel, not a decision by Congress.

24 Defendants, in response to plaintiff's post-hearing filing,
25 contend that because the Office of Law Revision Counsel submits its
26 editions of the United States Code to the Committee on the
27 Judiciary, it is that Committee, not the Office of Law Revision
28 Counsel, which makes the ultimate determination of where a law is

1 placed in the United States Code. Additionally, defendants argue
2 that because the actual public law text of a 1976 amendment to the
3 CAA contains a parenthetical reference to the CAA being found at "8
4 U.S.C. 1255, note," the placement of the CAA following section 1255
5 was indeed a Congressional Act.

6 I disagree with defendants that the 1976 public law's
7 reference to the CAA's location within the United States Code
8 demonstrates that Congress actually placed the CAA there. Notably,
9 while the Office of Law Revision Counsel has had authority since
10 1974 for placement of federal laws into the United States Code, it
11 is unclear what authority it has over laws passed before that date,
12 such as the original CAA. And, it is still entirely unclear to
13 this Court why the CAA was not codified. Most importantly, it
14 remains equally unclear that the presence of the CAA following
15 section 1255(a) was intended by Congress to indicate that the CAA
16 should be read as part of the INA. Even if Congress itself placed
17 the CAA in a note following section 1255(a), that does not, without
18 more, conclusively show that Congress meant for the CAA to become
19 part of the INA.

20 Additionally, I note that in the Artigas decision, the BIA
21 itself distinguished between adjustment status applications made
22 pursuant to "section 245 of the Act," meaning made pursuant to
23 section 1255(a) of the INA, and adjustment status applications made
24 under the CAA. Artigas, 23 I&N Dec. at 104. The court further
25 explained that "by specifically barring only section 245 relief .
26 . ., but making no mention of relief under the [CAA], the Attorney
27 General has declined to exercise her discretion to bar [CAA]
28 applications." Id. The BIA's decision in Artigas is inconsistent

1 with any argument that the CAA is to be considered part of section
2 1255(a) of the INA.⁶

3 This is a close question and one I do not resolve because, as
4 explained below, even if this Court has jurisdiction to review the
5 denial of plaintiff's adjustment application, I conclude that the
6 USCIS's decision should be affirmed.

7 IV. The Denial of Plaintiff's Adjustment Application

8 As noted above, the USCIS denied plaintiff's second adjustment
9 application under section 1182(a)(2)(C)(i), and alternatively, in
10 the exercise of its discretion after determining that the adverse
11 factors outweighed the positive factors. I do not address the
12 section 1182(a)(2)(C)(i) decision because I determine that the
13 discretionary determination is free of legal error and is supported
14 by substantial evidence.

15 According to the USCIS, plaintiff was arrested and/or charged
16 with the following: (1) on or about May 1, 1980, for "Sale or
17 Transportation of Marijuana"; (2) on or about October 7, 1980, for
18 "Grand Theft"; (3) on or about November 17, 1994, for "Menacing,
19 Recklessly Endanger Another, Carry Concealed/Unlawful Possession
20 Firearm"; and (4) on or about March 12, 1998, for "Contempt of
21 Court/Punitive Violation of Restraining Order." AR at p. 6.

22 The USCIS also found that plaintiff was convicted of the
23 following: (1) "Grand Theft" on October 7, 1980; (2) "32PC
24 (Accessory)" on December 2, 1980; (3) "Carry Concealed/Unlawful
25

26 ⁶ Although Martinez-Montalvo overruled Artigas, the
27 decision was based on an intervening change in regulations, not
28 on a change by the BIA in its treatment of the CAA as distinct
from the INA.

1 Possession Firearm" on February 3, 1995; and (4) "Punitive Contempt
2 of Court/Violation of Restraining Order" on April 17, 1998. Id.

3 The USCIS decision then states that

4 [t]he applicant was advised of this adverse information
5 in an "Intent to Deny" issued on August 31, 2009. The
6 response to the "Intent" was received on September 30,
7 2009. However, the applicant did not submit evidence
8 that would indicate that this discretionary application
9 should be approved based on the adverse factors outlined.
10 The applicant stated that this discretionary application
11 should be adjudicated through the appropriate lens of the
12 Cuban Adjustment Act, and use a less stringent standard.
13 It was also stated that the applicant has significant
14 family ties in the United States, and notes his longevity
15 here as well as the hardships for his family if this
16 application would be denied.

17 Id.

18 The USCIS concluded that plaintiff's "involvement in multiple
19 criminal acts as well as the serious nature of these acts reflects
20 a disregard for the laws of the United States." Id. at p. 7. The
21 USCIS explained that it had thoroughly reviewed the evidence and
22 afforded "due consideration to all positive factors, such as, but
23 not limited to, length of time in the United States, family ties,
24 etc." Id. Although plaintiff appeared to be statutorily eligible
25 to adjust status, the USCIS concluded that the adverse factors
26 greatly outweighed the "limited positive factors" in his case. Id.

27 The USCIS also rejected plaintiff's "proposed framework of
28 treating Cuban Adjustment Act adjustment applications under refugee
29 law as opposed to adjustment of status in INA sec. 245[.]" Id.
30 The USCIS then noted that the record did not indicate a showing of
31 unusual or outstanding equities on plaintiff's behalf that offset
32 plaintiff's adverse factors. Id. Therefore, "as a separate,
33 distinct and independent ground," the USCIS denied "this
34 application . . . as a matter of discretion." Id.

1 In reviewing the USCIS's denial of plaintiff's adjustment
 2 application, the court reviews questions of law under a de novo
 3 standard. Altamirano v. Gonzales, 427 F.3d 586, 591 (9th Cir.
 4 2005) (court reviews "purely legal questions concerning the meaning
 5 of the immigration laws de novo") (internal quotation omitted).
 6 Findings of fact are reviewed for substantial evidence. Hernandez
 7 v. Ashcroft, 345 F.3d 824, 832 (9th Cir. 2003) (determinations of
 8 fact, including determinations regarding eligibility for adjustment
 9 of status, are reviewed for substantial evidence).

10 The "substantial evidence" standard is "extremely
 11 deferential." Singh-Kaur v. INS, 183 F.3d 1147, 1149 (9th Cir.
 12 1999) (internal quotation omitted).

13 The court must uphold the BIA's findings unless the
 14 evidence presented would compel a reasonable finder of
 15 fact to reach a contrary result,; however, minor
 16 inconsistencies in the record are not an adequate basis
 17 for an adverse credibility finding, The
 possibility of drawing two inconsistent conclusions from
 the evidence does not prevent an administrative agency's
 finding from being supported by substantial evidence. .
 . . .

18 Id. (internal quotations, citations, and brackets omitted).

19 Plaintiff argues that an application for a discretionary
 20 adjustment of status under the CAA is not analyzed under 8 U.S.C.
 21 § 1255, but rather, is properly analyzed under laws and principles
 22 developed for those applying for asylum under 8 U.S.C. § 1258(b).
 23 Plaintiff cites to no case law, statute, or regulation that
 24 expressly supports this argument. Instead, plaintiff suggests that
 25 because the CAA was meant as an ameliorative program to protect
 26 Cubans fleeing the Castro regime, Congress intended the CAA to
 27 operate similarly to "the asylum mechanism."

28 There is some authority to support the proposition that the

1 CAA is remedial in nature and thus, should be construed liberally.
2 Matter of Mesa, 12 I&N Dec. 432 (BIA 1967) (further noting that the
3 purpose of the CAA "is to provide a ready means to permit certain
4 Cuban refugees in the United States to adjust to permanent resident
5 status, in the discretion of the Attorney General[.]"); see also
6 Note, The Cuban Adjustment Act of 1966: ?Mirando Por Los Ojos de
7 Don Quijote or Sancho Panza?, 114 Har. L. R. 902, 910-11 (2001)
8 (discussing four separate bases motivating Congressional passage of
9 the CAA, including humanitarian concerns of providing a safe haven
10 for victims of persecution, as well as national security concerns,
11 reducing administrative burdens on Cuban refugees already in the
12 United States, and providing an expeditious way by which Cuban
13 refugees in the United States could join the American workforce).

14 Nonetheless, I agree with defendants that the USCIS did not
15 err in applying cases and law developed under 8 U.S.C. § 1255(a) to
16 guide its discretion in analyzing plaintiff's application under the
17 CAA. Several reasons support this conclusion.

18 First, there is no statute, regulation, court decision, or BIA
19 decision affirmatively establishing a distinct analysis used for
20 CAA adjustment applications. Second, I agree with defendants that
21 plaintiff's status as a parolee is analogous to that of a person
22 having been already been granted asylum and thus, is
23 distinguishable from one seeking asylee or refugee status.
24 Plaintiff's contention that asylum or refugee law should be used to
25 adjudge his CAA adjustment application is unsupportable because
26 plaintiff, as a result of being a parolee, is in effect already
27 similarly situated to an asylee or refugee.

28 As explained in the Harvard Law Review article, an immigrant

1 from Cuba does not need to apply for political asylum and establish
2 a well-founded fear of persecution before seeking permanent
3 resident status because the CAA allows Cubans to bypass the asylum
4 process. Id. at 905-06. "Cuban immigrants who flee to the United
5 States . . . receive preferential treatment, as they are not
6 required to apply for political asylum or prove that they are
7 refugees." Id. at 906. Rather, they "circumvent the asylum
8 process because they are generally paroled into the country." Id.
9 at 907.

10 Immigrants from countries who contend they are victims of
11 persecution must first establish their status as a refugee or
12 asylee, and then they may seek an adjustment to permanent resident
13 status. See 8 U.S.C. §§ 1157 (governing annual admission of
14 refugees and admission of emergency situation refugees), 1158
15 (governing asylum) 1159 (governing adjustment of status of refugees
16 and asylees). The statutory scheme establishes two separate steps
17 for such immigrants.

18 The same is true of Cuban immigrants seeking adjustment under
19 the CAA. They must first have been paroled into the country and
20 then they may separately seek adjustment of status. The act of
21 parole is the procedural equivalent to the admission of an
22 individual as an asylee or refugee. Accordingly, an application to
23 adjust status under the CAA is not parallel to a request for
24 asylum. The former is the second step in a two-step process while
25 the latter is the first step in a two-step process and it would be
26 error to equate them.

27 Third, the Ninth Circuit suggests that the discretionary
28 determinations allowed by the INA for waiver of deportation,

1 voluntary departure, and adjustment of status, all use a balancing
2 of the equities inquiry. Paredes-Urrestarazu v. INS, 36 F.3d 801,
3 810 (9th Cir. 1994) (discretionary determinations made in waiver of
4 deportability cases, voluntary departure cases, and adjustment of
5 status cases, all involve the "same type of balancing of
6 equities"); see also Vargas-Hernandez v. Gonzales, 497 F.3d 919,
7 924 n.4 (9th Cir. 2007) (noting that equities in a section 212(c)
8 analysis (seeking waiver of deportation), are similar to those used
9 in adjustment of status). I see no principled reason for
10 distinguishing CAA adjustment applications from the other
11 discretionary determinations made under various provisions of the
12 INA.

13 Fourth, the most similar statute in the INA to the CAA is 8
14 U.S.C. § 1255. Finally, I note that in 2010, the purposes behind
15 the CAA and giving Cuban immigrants preferential treatment in
16 becoming permanent residents no longer appear relevant. See Cuban
17 Adjustment Act of 1966, 114 Harv. L. Rev. at 911-14 (explaining why
18 the four justifications for the CAA are outdated). Any vitality
19 that plaintiff's argument regarding equating CAA adjustment
20 applications to asylum applications might have had in the 1960s and
21 1970s is largely absent today.

22 Under the de novo standard of review used to review questions
23 of law, I conclude that the USCIS properly relied on the law and
24 analysis developed under 8 U.S.C. § 1255 to adjudicate plaintiff's
25 adjustment application under the CAA and thus, the USCIS made no
26 errors of law. I next consider whether the USCIS's decision is
27 supported by substantial evidence.

28 Because the decision to grant an adjustment of status is

1 "purely discretionary" and constitutes an "extraordinary remedy to
2 be granted only in meritorious cases," the alien bears the burden
3 of proof and of persuading the USCIS to exercise its discretion
4 favorably. Eide-Kahayon v. INS, 86 F.3d 147, 150 (9th Cir. 1996).
5 When making a discretionary determination, the BIA must "explain
6 what factors it has considered or relied upon sufficiently that we
7 are able to discern that it has heard, considered, and decided."
8 Kalubi v. Ashcroft, 364 F.3d 1134, 1140-41 (9th Cir. 2004)
9 (internal quotation omitted). The BIA's conclusion must be
10 "explained with enough clarity that we can understand the
11 rationale." Id. at 1141.

12 In discretionary determination cases, including adjustment
13 cases, the agency is required to balance positive versus negative
14 factors. E.g., Vargas-Hernandez v. Gonzales, 497 F.3d 919, 924 n.5
15 (9th Cir. 2007) (citing In re Mendez-Morales, 21 I&N Dec. 296,
16 299-300 (BIA 1996) for proposition that exercise of discretion is
17 a case by case balancing for all forms of discretionary relief);
18 Rashtabadi v. INS, 23 F.3d 1562, 1570 (9th Cir. 1994) (noting that
19 "[o]ne general, analytical approach governs all decisions on
20 whether to grant discretionary relief . . . The BIA or the IJ
21 decides whether an applicant is entitled to a favorable exercise of
22 agency discretion [under § 245] on a case by case basis by taking
23 into account the social and humane considerations presented in an
24 applicant's favor and balancing them against the adverse factors
25 that evidence the applicant's undesirability as a permanent
26 resident.") (internal quotation omitted, bracket in Rashtabadi);
27 see also Matter of Arai, 13 I&N Dec. 494, 496 (BIA 1970) ("[w]here
28 adverse factors are present in a given application, it may be

1 necessary for the applicant to offset these by a showing of unusual
2 or even outstanding equities").

3 As noted above, in support of the discretionary denial of
4 plaintiff's adjustment application, the USCIS noted four arrests
5 and four convictions. AR at p. 6. Plaintiff admits that he was
6 arrested in Josephine County, Oregon, for Menacing, Recklessly
7 Endangering, and Carrying a Concealed/Possession of a Firearm, and
8 as a result of this arrest, on February 3, 1995, was convicted of
9 Carrying a Concealed/Possession of a Firearm and sentenced to three
10 years of probation. AR at pp. 6, 118-20, 292. Plaintiff also
11 admits that he was arrested in Josephine County, Oregon, on March
12 12, 1998 for Contempt of Court and as a result, on April 17, 1998,
13 was convicted of Punitive Contempt of Court - Violation of a
14 Restraining Order and sentenced to twelve months of probation. AR
15 at pp. 6, 123-24, 292.

16 Plaintiff contests the USCIS's assertions that he was arrested
17 for or charged with the sale or transportation of marijuana in
18 1980, that he was convicted in December 1980 of "32PC (Accessory),"
19 that he was arrested or charged with "Grand Theft," on or about
20 October 7, 1980, and that he was convicted of "Grand Theft," on or
21 about October 7, 1980. He contends that the evidence in the
22 Administrative Record regarding these two arrests and convictions
23 is unreliable, not substantial, and may not be used against him in
24 the relevant balancing inquiry.

25 The primary record regarding the marijuana arrest and later
26 conviction consists of three pages from the Los Angeles Police
27 Department, with the first labeled "Arrest Report," the second
28 labeled "Continuation Sheet," and the third labeled "Disposition of

1 Arrest and Court Action." AR at pp. 293-95. None of the three
2 pages in the Administrative Record is easy to read, but, it is
3 readily apparent that the first page indicates that plaintiff, or
4 someone with his name, was arrested for a "Hard Narc" offense
5 occurring May 1, 1980, at the "Hardor" or "Harbor" "OCC School."
6 AR at p. 293. There is a reference to "11360(A) H&S SL OR TRS
7 MARIJ." Id. There's a handwritten reference to evidence of "Buy
8 Notes." Id. The next page are handwritten notes indicating that
9 officers learned from "buy notes" that Undercover Officer Holguin
10 purchased marijuana on February 9, 1980 from plaintiff. AR at p.
11 294. The page also indicates that plaintiff was arrested for
12 "11360(A), H&S Sale of Marij" and was then booked at Harbor
13 Station. Id.

14 The third page suggests that the 11360 charge was a felony to
15 which plaintiff initially pleaded not guilty, but which was then
16 later dismissed. AR at p. 295. The record also suggests that
17 plaintiff pleaded guilty to a second charge of "32PC," also a
18 felony, for which he received thirty-six months of probation. Id.
19 It shows a date of sentence of December 2, 1980. Id. Admittedly,
20 this page is difficult to read and there is no guide to the various
21 abbreviations used. But, even so, it is sufficiently discernable
22 and understandable to support a suggestion that plaintiff pleaded
23 guilty to some charge connected with the February 1980 marijuana
24 arrest.

25 The other record regarding these arrests and convictions is a
26 four-page FBI criminal history printout. AR at pp. 289-93. That
27 record recites that plaintiff was arrested and charged with the
28 sale or transportation of marijuana on May 1, 1980, by the Los

1 Angeles Police Department, and that this charge was dismissed on
2 December 2, 1980, but on that same date, plaintiff was convicted of
3 "32PC" for which he received 120 days of confinement, followed by
4 thirty-six months of probation. Id. This record also shows that
5 on January 3, 1983, the charge was dismissed and the "32PC"
6 conviction was set aside. Id.

7 The FBI criminal history printout is the only record showing
8 the arrest and conviction for "grand theft." AR at p. 291. It
9 recites an October 10, 2007 arrest by the Hemet Police Department
10 for which plaintiff was subsequently convicted and received ninety
11 days confinement and two years of probation. Id.

12 Plaintiff argues that the Los Angeles Police Department and
13 FBI records do not support the USCIS's factual findings regarding
14 his marijuana arrest, his "32PC" conviction, his grand theft
15 arrest, and his grand theft conviction. He argues that the
16 reliability of the Los Angeles Police Department Records is
17 "dubious at best" because the arrest report is based on an
18 unidentified individual's impression of some other individual's
19 notes, which are not part of the record. He also contends that it
20 is impermissible to rely on the fact of an arrest to support a
21 negative inference about his conduct.

22 The question on review is whether the USCIS's factual findings
23 are supported by substantial evidence on the record as a whole.
24 E.g., INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (defining
25 substantial evidence review for asylum claims); Abebe v. Gonzales,
26 432 F.3d 1037, 1039-40 (9th Cir. 2005) (noting that agency
27 determinations are to be affirmed if they are supported by
28 "reasonable, substantial, and probative evidence on the record

1 considered as a whole") (internal quotation omitted).

2 Here, plaintiff concedes the two convictions from the 1990s.
3 Although they are approximately twelve and fifteen years old, they
4 are not insignificant. As to the marijuana arrest and subsequent
5 "32PC" conviction, which, apparently, was later dismissed, the Los
6 Angeles Police Department three-page report is sufficient to
7 indicate that plaintiff was arrested in 1980 for the sale and
8 transportation of marijuana and was later convicted for some
9 offense in connection with that arrest.

10 The FBI report provides additional confirmation of the arrest
11 and subsequent conviction. Even though the record fails to
12 establish what "32PC" is, the police report and the FBI report show
13 that the conviction was related to the marijuana arrest. Moreover,
14 plaintiff offers no reason to reject as unreliable the information
15 in the FBI criminal history printout showing both the marijuana-
16 related arrest and conviction and the "grand theft" arrest and
17 conviction.

18 In Paredes-Urrestarazu, the plaintiff argued that a prior
19 narcotics charge could not be used in determining whether he was
20 deserving of discretionary relief from deportation under 8 U.S.C.
21 § 1182(c) because the charges against him were dismissed after his
22 successful completion of a diversion program established by state
23 law. The state diversion law explicitly provided that "[u]pon
24 successful completion of a diversion program the arrest upon which
25 the diversion was based shall be deemed to have never occurred."
26 36 F.3d at 805 n.2. In addition to other arguments, the plaintiff
27 contended that the "FBI Rap Sheet" reflecting the narcotics charge,
28 could not be admitted by the IJ because to do so would violate the

1 state diversion statutes.

2 The Ninth Circuit rejected the plaintiff's argument and held
3 that the BIA did not have to give effect to the diversion program
4 in making a discretionary determination. Id. at 808-15. Having
5 reached that conclusion, the Ninth Circuit then dismissed the
6 plaintiff's concern that the IJ should not have introduced the FBI
7 Rap Sheet into the administrative record. Id. at 816; see also
8 Rosales-Pineda v. Gonzales, 452 F.3d 627, 630-32 (7th Cir. 2006)
9 (BIA did not err in relying on information in FBI "Rap Sheet" as
10 evidence that "reasonably indicated the existence of a criminal
11 conviction" when some of the information was confirmed by other
12 evidence in the record).

13 There is no dispute that plaintiff was made aware of the
14 USCIS's intent to rely on these arrests and convictions in
15 considering his adjustment application. The August 31, 2009 NOID
16 made express reference to these arrests and convictions and cited
17 to them as support for the proposed denial of plaintiff's
18 application. AR at pp. 8-12. In response to the NOID, plaintiff
19 submitted several documents including a letter memorandum,
20 photographs, letters from family members and friends, and an
21 unsworn, signed statement from plaintiff stating simply that "the
22 synopsis contained in the Notice of Intent to Deny about me and the
23 1980 arrest is inaccurate and false." AR at pp. 13-84.

24 The "synopsis" plaintiff referred to is the following
25 statement by the USCIS in the NOID: "On February 9, 1980, an
26 undercover officer purchased marijuana from the applicant in a
27 sting operation. The applicant was then arrested by law
28 enforcement. The applicant was subsequently charged with the 'Sale

1 or Transportation of Marijuana.'" AR at pp. 10-11. Notably,
2 plaintiff's response to the NOID was to simply deny the accuracy of
3 this statement. Also, plaintiff's statement refers only to the
4 "synopsis" which addresses only the marijuana arrest and thus,
5 plaintiff appears to have never challenged the USCIS's reliance on
6 the grand theft arrest and conviction. Although plaintiff bears
7 the burden of proof and the burden of persuading the USCIS to
8 exercise its discretion in his favor, he failed to submit any
9 explanation of the arrest or additional facts regarding the
10 circumstances of the underlying incident. Without such explanation
11 or additional facts, he fails to demonstrate why the information in
12 the Los Angeles Police Department and FBI records is inaccurate or
13 unreliable.

14 Plaintiff also contends that it is error for the USCIS to rely
15 only on the fact of an arrest in making its determination. I do
16 not read the USCIS's discretionary determination as relying solely
17 on the fact of an arrest. Rather, the USCIS relied on the history
18 of four arrests and four convictions. Even though the FBI criminal
19 history printout indicates that the marijuana conviction was later
20 set aside, there are three other criminal convictions established
21 in the record.

22 Additionally, even if the USCIS had relied on the fact of
23 plaintiff's marijuana arrest alone, it would not have been error in
24 this case. As the parties note, no conviction is required to
25 support a denial of an adjustment application based on 8 U.S.C. §
26 1182(a)(2)(C)(i), the drug trafficker statute. See Lopez-Umanzor
27 v. Gonzales, 405 F.3d 1049, 1053 (9th Cir. 2005) ("Section
28 1182(a)(2)(C) does not require a conviction, but only a 'reason to

1 believe' that the alien is or has been involved in drug
2 trafficking"); Lopez-Molina v. Ashcroft, 368 F.3d 1206, 1209 (9th
3 Cir. 2004) ("Section 1182(a)(2)(C) . . . does not require a
4 conviction in order for the alien to be deemed removable"). If a
5 conviction is not required as a basis for determining statutory
6 ineligibility under section 1182(a)(2)(C), it is similarly not
7 required as a basis for the exercise of discretion.

8 Additionally, while the Ninth Circuit has, as plaintiff notes,
9 indicated it would be "troubled" by the BIA finding the "mere fact
10 of an arrest" probative of whether an alien has engaged in
11 underlying conduct, the court also expressly made clear that

12 [t]he fact of arrest, insofar as it bears upon whether an
13 alien might have engaged in underlying conduct and
14 insofar as facts probative of an alien's bad character or
15 undesirability as a permanent resident arise from the
16 arrest itself, plainly can have relevance in performing
17 the analysis required by section 212(c) [allowing
18 discretionary relief from deportation].

19 Paredes-Urrestarazu, 36 F.3d at 810 (internal quotation omitted)
20 (further noting that the breadth of a section 212(c) inquiry
21 "permits the Board to consider evidence of conduct that does not
22 result in a conviction").

23 Furthermore, the case cited by the Ninth Circuit in support of
24 its expression of concern about the BIA's reliance on the "mere
25 fact of an arrest," stated, according to the Ninth Circuit, in
26 dicta, that police reports concerning conduct for which no
27 prosecution resulted should not have been counted as adverse
28 factors in denying section 212(c) relief. Id. at 816 n.15 (citing
29 Sierra-Reyes v. INS, 585 F.2d 762, 764 n.2 (5th Cir. 1978)). Here,
30 in terms of plaintiff's marijuana arrest, there is more than a
31 police report concerning conduct for which no prosecution was

1 commenced. The Los Angeles Police Department arrest report
2 includes a reference to the undercover purchase of marijuana by
3 plaintiff. It refers to facts regarding the offense. Thus, it is
4 not just a police report of a stop absent an arrest, or absent any
5 reference to underlying conduct. The record further shows that
6 plaintiff was prosecuted for that conduct.

7 The concern expressed by Paredes-Urrestarazu and Sierra-Reyes
8 is that the agency should not rely solely on an arrest absent
9 information regarding the conduct for which the arrest was made.
10 Since that is not the case here, the USCIS properly considered the
11 marijuana arrest and its underlying conduct.

12 As a whole, the record contains a combination of weak and
13 strong evidence of the events the USCIS relied on in support of its
14 determination that plaintiff had a history of multiple criminal
15 acts. Considering the evidence in its totality, the USCIS's
16 factual determinations regarding plaintiff's criminal history of
17 arrests and convictions, is supported by substantial evidence in
18 the record.

19 Plaintiff also argues that the USCIS erred by not discussing
20 his positive factors. But, the USCIS did specifically note
21 plaintiff's length of time in the country and his family ties, and
22 it had earlier mentioned plaintiff's assertion that a denial of his
23 application would create a hardship on his family. More extensive
24 discussion was not required.

25 The balancing of equities is reviewed for an abuse of
26 discretion. See Paredes-Urrestarazu, 36 F.3d at 807 (noting
27 standard for section 212(c) cases). In reviewing an agency
28 determination, whatever decision this Court might make in the first

1 instance is irrelevant. Given the record as a whole, I cannot say
2 that the USCIS's decision to deny plaintiff's application was
3 unreasonable and an abuse of its discretion. Therefore, I affirm
4 the USCIS's decision and grant summary judgment to defendants on
5 plaintiff's first and third claims for relief.

6 CONCLUSION

7 Plaintiff's motion for summary judgment (#32) is denied.
8 Defendants' motion to dismiss, or alternatively for summary
9 judgment (#35) is granted.

10 IT IS SO ORDERED.

11 Dated this 28th day of May, 2010.

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14 /s/ Dennis James Hubel
15 Dennis James Hubel
United States Magistrate Judge
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